STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

STALINITA QUIJANO JAVIER,	)	
	)	
Charging Party,	)	Case No. SF-CE-319-H
	)	
v.	)	PERB Decision No. 910-H
	)	
CALIFORNIA STATE UNIVERSITY, SAN FRANCISCO,	)	November 18, 1991
	)	
Respondent.	)	
	)	

Appearances: Stalinita Quijano Javier, on her own behalf; Bruce M. Richardson and Sonny Lo, Attorneys, for California State University, San Francisco.

Before Hesse, Chairperson; Shank and Camilli, Members.

DECISION

CAMILLI, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Stalinita Quijano Javier (Javier) to the proposed decision (attached hereto) of a PERB administrative law judge (ALJ) which held that the California State University, San Francisco (University), did not violate section 3571(a) of the Higher Education Employer-Employee Relations Act (HEERA)[1] when it released Javier from her

[1]HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571 states, in pertinent part:

> It shall be unlawful for the higher education employer to do any of the following:
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> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of

employment. Specifically, the proposed decision found that although Javier had engaged in protected activity of which the University had knowledge, there was insufficient evidence of unlawful motive on the part of the University. Therefore, Javier failed to prove the nexus required for a finding of retaliation for participation in protected activities in violation of section 3571(a) of HEERA. (Novato Unified School District (1982) PERB Decision No. 210; Carlsbad Unified School District (1979) PERB Decision No. 89.)[2] The Board has reviewed the entire record in this case, including the proposed decision, the exceptions and responses thereto, and the transcript of the hearing, and finding the proposed decision to be free of prejudicial error, adopts it as the decision of the Board itself consistent with the following discussion.

JAVIER'S EXCEPTIONS

Javier excepts to the testimony of Mary McHoney (McHoney), Javier's supervisor, that only two employees were given a one-year probationary period. Javier claims that, in fact, she was the only employee ever given a two-year probationary period. In support of this contention, Javier states that subsequent to her hiring she was involved in hiring and interviewing new

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this subdivision, "employee" includes an applicant for employment or reemployment.

[2]In California State University, Sacramento (1982) PERB Decision No. 211-H, the Board found the tests in Novato Unified School District, supra, and Carlsbad Unified School District, supra, applicable to cases arising under HEERA.

nurses, and was not aware of anyone who was given a two-year probationary period.

Javier also claims the ALJ erred in the statement that Javier did not call Mike McMolly (McMolly) to give testimony or otherwise offer rebuttal evidence to the direct testimony of McHoney or Myra Lappin (Lappin) on the issue of the length of her probationary period. Javier contends that the revision of "appointment"[3] was generated by personnel, and given to her by McHoney on September 14, 1990, a day after her first evaluation. Javier states that the reference to McMolly should instead be to O'Malley, and it was not O'Malley who gave her the "appointment." Javier further claims that if the "appointment" was dated June 25, 1990, the University should not have waited three months before obtaining Javier's signature.

Javier takes exception to the ALJ's statement that if the probationary period was truly one year, Javier would have attacked the adverse evaluation given after that period of time as being untimely. In support of this exception, Javier attaches to her appeal a letter to McHoney dated October 11, 1990, in which Javier stated:

> Timely evaluations can prevent just the sort of buildup of misunderstanding and stockpiling of concerns you seem to have.
>
> During the past year I asked several times for a written evaluation to take the pulse of my performance and to have the chance to

[3]It is assumed for these purposes that Javier's use of the term "appointment" in her appeal refers to the letter notifying her of the change in her probationary period.

correct any deficiencies at the earliest point.

Javier contends that the testimony of McHoney that Javier was assigned eight hours out of forty per week to perform clinical duties was in error. Javier claims that she worked a minimum of twenty-four clinical hours and also filled in for absent nurses for an additional eight hours per week. Therefore, she claims she did not have sufficient time to perform her administrative duties.

Javier also excepts to the ALJ's statement that it was unclear how many times Javier secured meeting rooms in departmental facilities for nurses to discuss employment-related issues. In support, she states that she did not make copies of all memos regarding such meetings when she left her office at the University.

Javier further claims that the ALJ incorrectly stated that it was unknown whether a meeting actually took place regarding Javier's evaluation. Javier states that David Morganstern has a written report of all meetings which took place on this issue, and attaches the report to her exceptions.

Finally, Javier generally protests the proposed decision and states, "Although I did not have the chance to present more evidence during the PERB hearing, I am now presenting the lacking evidence."

THE UNIVERSITY'S OPPOSITION TO EXCEPTIONS

The University opposes Javier's contention that she did not have a chance to present evidence at the hearing. The University

argues that Javier has not cited any portion of the record wherein a motion to admit evidence into the record was denied by the ALJ. Rather, Javier is attempting to simply add to the record once the hearing is closed. To allow such augmentation would be in contravention of PERB Regulation 32300(b)[4] which states, "Reference shall be made in the statement of exceptions only to matters contained in the record of the case." The University argues that the "evidence" referred to in Javier's exceptions is not a part of the record and therefore cannot be taken into consideration.

DISCUSSION

Javier's first exception is to McHoney's testimony that two employees were erroneously given one-year probationary status. In the proposed decision, the ALJ credits McHoney's testimony with regard to this issue. It is an established principle of PERB case law that the Board generally grants deference to the credibility determinations of ALJs. This rule recognizes the fact that, by virtue of having witnessed the live testimony, an ALJ is in a better position to accurately make such determinations than the Board itself, which only reviews the cold transcript of the hearing. (Temple City Unified School District (1990) PERB Decision No. 841, p. 5.) Where, as in this case, there is no evidence in the record which supports overturning such credibility determinations, the Board will defer to the

[4]PERB Regulations are codified at California Code of Regulations, title 8, section 31001 et seq.

ALJ's findings. (Whisman Elementary School District (1991) PERB Decision No. 868, p 11, fn. 4.) In addition, there is no evidence on the record which contradicts the testimony of McHoney in this regard. This exception is therefore rejected.

Javier contends that the ALJ erred in finding that Javier did not call O'Malley to the stand nor did she offer other rebuttal evidence to the direct testimony of McHoney or Lappin on the issue of the change in the length of the probationary period. In the proposed decision, the ALJ accurately states that there is no rebuttal evidence on the record. Javier further contends that neither the personnel department nor McHoney should have waited three months to allow her to sign the "appointment,"[5] and especially should not have had her sign it a day after receiving her initial evaluation. The Board has held where an adverse action occurs within close proximity in time to a protected activity, it constitutes circumstantial evidence of unlawful motive. (Novato Unified School District, supra, PERB Decision No. 210; Carlsbad Unified School District, supra, PERB Decision No. 89.) However, the initial evaluation does not constitute protected activity, and therefore the signing of the letter, even if it could be considered an adverse action, is not proximate in time to any protected activity. Accordingly, this argument is rejected.

Javier takes exception to the ALJ's statement that if Javier's probation was one year, Javier might have attacked the

[5]See footnote 2, above.

adverse evaluation given after that period of time on this basis. Javier attaches a memorandum from herself to McHoney to her statement of exceptions, in which Javier stated, in pertinent part: "Timely evaluations can prevent just this sort of buildup of misunderstanding and stockpiling of concerns you seem to have." The ALJ accurately stated that there is no evidence on the record that the negative evaluation given after Javier's first year of employment was attacked on the basis of Untimeliness. California State Employees Association wrote a letter to McHoney on behalf of Javier, requesting a meeting to review the evaluation. This letter did not raise the issue that the evaluation was untimely. More importantly, however, any inaccuracy with regard to the ALJ's statement in question is nonprejudicial. This statement refers to corroborative evidence regarding the factual issue of the standard probationary period for nurses in the same class as Javier. The ALJ's conclusion that the probationary period for such position was two years was based upon record evidence and credibility determinations. Javier's exception is rejected as without merit.

Javier takes exception to McHoney's testimony that she was assigned eight hours out of a forty hour work week to perform clinical duties. Javier claims she worked a minimum of twenty-four hours on the floor and an additional eight hours filling in for absent nurses. In the proposed decision, the ALJ correctly restated the testimony of both Javier and McHoney on this issue. Based upon the testimony of record, the ALJ found that the

University determined that Javier had not and could not rise to an acceptable level of performance. Accordingly, the University rejected Javier from probation. The Board finds no reason to overturn the ALJ's findings, and therefore rejects this exception.

Javier contends the ALJ's statement that it is unclear how many times or the dates when Javier secured meeting rooms for nurses to discuss employment-related issues is in error. Javier claims she does not have copies of every memo which she circulated while working at the University. This exception is irrelevant to the ALJ's determination. Furthermore, any inaccuracy is nonprejudicial to Javier. The factual issue of organizing meetings for employees goes to the legal element of protected activity, which the ALJ determined in Javier's favor by concluding that she was engaged in protected activity. Furthermore, there is no evidence on the record which contradicts the ALJ's statement that it is unclear how many times and the dates of such meetings. This exception lacks merit and is therefore rejected.

Javier excepts to the ALJ's statement that it is unknown whether a meeting took place regarding Javier's evaluation. In her appeal, Javier refers to a report by David Morganstern which is attached to her appeal. This report purportedly identifies **various** meetings regarding Javier. There is no evidence on the record to contradict the factually accurate statement made by the

ALJ that it is unclear whether a meeting took place regarding the evaluation. This exception is, therefore, rejected.

Finally, Javier appeals the proposed decision on the ground that, "Although [she] did not have the chance to present more evidence during the PERB hearing, [she is] now presenting the lacking evidence." All of the evidence included in her statement of exceptions, which Javier seeks to have the Board consider, is outside of the record in this case and, therefore, cannot be considered. Only record evidence may be considered on exceptions taken to a proposed decision. (PERB Regulation 32300(b).) As stated by the University in its response to this appeal, Javier made no argument, nor is there any evidence in the transcript of the hearing, that she was unable to present any evidence during the hearing. Based upon all of the above, the Board finds Javier's appeal to be without merit.

ORDER

For the reasons stated above, the unfair practice charge and complaint in Case No. SF-CE-319-H are hereby DISMISSED.

Chairperson Hesse and Member Shank joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

STALINITA QUIJANO JAVIER, Charging Party, v. CALIFORNIA STATE UNIVERSITY, SAN FRANCISCO, Respondent.	)	Unfair Practice Case No. SF-CE-319-H PROPOSED DECISION (9/4/91)

Appearances: Robert Mueller for Charging Party, Stalinita Quijano Javier; Sonny Lo for Respondent, California State University, San Francisco.

Before Gary M. Gallery, Administrative Law Judge.

PROCEDURAL HISTORY

A probationary employee contends she was terminated after she recruited employees to join a union and invoked her right to union representation on unfavorable evaluations. The employer contends that the action was unrelated to union activities.

On March 8, 1991, Stalinita Quijano Javier (Javier or Charging Party) filed an unfair practice charge against the California State University, San Francisco (CSU, employer). After investigation, the General Counsel of the Public Employment Relations Board (PERB or Board) issued a complaint on April 22, 1991, charging the employer with violation of Government Code section 3571(a) by its alleged release of Javier, a probationary employee, for exercise of rights guaranteed by the Higher Education Employer-Employee Relations Act (HEERA), specifically, holding a job steward position with the California State Employee's Association (CSEA) and for seeking union assistance in

challenging a performance evaluation.[1] The employer's timely answer denied violation of the HEERA and asserted that its action was justified.

A settlement conference was conducted by PERB without success. Formal hearing was held in the San Francisco Regional Office on August 31, 1991. At hearing, the parties waived receipt of transcripts of hearing and post-hearing briefs. The case was submitted for proposed decision at the conclusion of the hearing.

FINDINGS OF FACT

Charging Party was an employee within the meaning of section 3562(f). CSU is an employer within the meaning of section 3562(h).

Javier, a nurse since 1964, was appointed Registered Nurse III in the Student Health Services department on or about June 12, 1989. Her position was assistant to the nursing director. Mary McHoney (McHoney) has been, since October of 1988, the Director of Nurses, and Myra Lappin (Lappin), M.D., has been, for all times relevant, the director of the department.

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[1]The HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3571(a) states:

> It shall be unlawful for the higher education employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. . . .

Javier's letter of appointment, dated June 12, 1989, called for a probationary period ending date of June 6, 1990. However, a year later, by letter dated June 25, 1990, similar in form to the June 1989 letter, Javier was notified that she would be on probationary status until June 6, 1991. This form was signed off by Javier on September 14, 1990. Both letters were signed off by the Director of Personnel Services and were issued from that department.

Javier testified that a Mike McMolly (McMolly) told her during her orientation that her position had a one-year probationary period.

According to McHoney, the personnel department, who "generates" these appointment letters, called and informed her that two employees, including Javier, had been erroneously processed with letters indicating one-year probationary status.

McHoney and Lappin were convincing in establishing that nurses, including the class occupied by Javier, have a two-year probationary period. Javier did not call McMolly to the formal hearing, nor did she offer rebuttal evidence to the direct testimony of either McHoney or Lappin on this point. Conversely, McHoney was straight forward and convincing that she had no involvement in the preparation or cause of the June 1990 letter from the personnel office. Finally, in communications between Javier's employee organization representative and McHoney about subsequent evaluations, the issue of the term of probationary

period was not raised. It would seem that if the probationary period was only one-year as contended by Charging Party, the adverse evaluation given after that period of time would have been attacked in the letter because it was untimely. Such argument was not raised however. It is concluded that the probationary period for the position occupied by Javier was two years.

During Javier's first six months of employment, she was involved mostly in clinical activities. In December of 1989, after six months on the job, she asked McHoney for "feedback" on her performance. McHoney told Javier her performance was "exemplary."

In January of 1990, McHoney began to assign administrative responsibilities to Javier. Javier was responsible for the immediate supervision of 15 employees and 5 student assistants.

Javier complained of the limited time she had to spend in administrative duties compared to the time she was involved in clinical or on-the-floor duties. Javier testified that she was told that her work would be mostly supervisory and a little work on the floor. According to her, it turned out the other way. She spent more time on the floor. She was in her words, a "jack of all trades," working in different departments. She filled in behind absent nurses and then did her administrative duties.

According to McHoney, Javier was actually assigned only about 8 hours out of 40 hours per week for clinical duties. She did however, fill in behind nurses that were absent. The job

duties for Javier's position, which was new, called for its occupant to spend 70 percent of the time on clinical duties (hands-on-nursing) and 30 percent on administrative or paperwork type of activity. The latter included scheduling of nurses on a day-to-day or week-to-week basis. Prior to Javier's arrival, McHoney was the only supervisor.

McHoney was supportive of Javier. McHoney frequently complimented Javier's work. A birthday card in the spring of 1990 reveals McHoney's warm regard for working with Javier. Javier had, wrote McHoney, "a heart of gold." At staff meetings, McHoney complimented Javier on her clinical skills. She gave Javier a rose and told her she was a valuable partner, and that she was pleased to have Javier.

McHoney said there were discussions about Javier's administrative abilities, once she began to assume supervisory responsibilities. Javier often couched intended orders as "Mary wants," when it should have been Javier giving the direct order. In the spring Javier attended a two-day management training program, paid for by the employer. Javier testified that comments before September of 1990 were positive. Later she testified that both before and after the evaluations (the first in September), she felt "stifled" on her job. She was told she should be more independent but, she complained, she was not given the freedom to decide, and was always questioned on how she did certain things.

Javier recruited unit members to join CSEA. Five new members refiled applications with the union during the month of March 1990. Javier was the designated recruiter.

Javier was also active in securing meeting rooms in departmental facilities for the nurses to discuss employment related issues. It is unclear how many times (Javier said several), or when this occurred. She secured from a physician the means by which the nurses could meet at the facility. Javier testified that she would report to McHoney the number of members she had signed up. The only evidence on recruitment shows the sign-ups that occurred in March. Javier secured McHoney's permission to have the planned meetings and then sent confirming memos with copies to Lappin and McHoney regarding time, date and place of union meetings. Javier also testified about an event she attended in Sacramento regarding nurses salary. She reported this meeting to McHoney.

It is found that McHoney knew of Javier's recruitment efforts and arrangements to have meetings in the Student Health Center.

McHoney herself supported nurses joining the union. From the fall of 1989, at staff meetings, and informally, she expressed support for the nurses to join and get involved with the union. McHoney was sensitive to nurses concern for classification progression (e.g., moving from Registered Nurse I to Registered Nurse II) and nurse pay disparity in the facility compared to employees in other departments and in the greater Bay

Area. In January of 1990, after nurse-practitioners got a raise and nurses did not, McHoney encouraged the nurses to get active in the union. McHoney gave permission to use the nurses lounge for a meeting or meetings of nurses on employment issues.

McHoney gave Javier her first evaluation on September 13, 1990. According to Javier, two days before she received this performance evaluation, or on about September 11, she went to McHoney who was "tearful" and "upset." Javier asked why and McHoney stated that she had a fight with Cindy Lee (Lee), a lab technician. Comments by Lee had made McHoney upset. Javier's testimony is vague and limiting on the extent of her own involvement. She was not involved in any labor dispute involving Cindy Lee, she testified. Javier asked McHoney if she would like to meet with Lee about the situation. That was all Javier did, she said.

The September 13 evaluation, Javier's first formal evaluation prepared by McHoney, was generally supportive of Javier's nursing skills. In clinical skills, clinical knowledge and attitude, McHoney rated Javier "above average." However, in regard to supervisory responsibilities, Javier was rated as not satisfactory. McHoney wrote that as Assistant to the Director, Javier had many tasks, and although she performed well in specific or concrete work, other tasks seemed to "overwhelm" her. Of particular concern to McHoney was Javier's inability to take care of short and long range scheduling of staff, failure to communicate necessary information to staff and her inadequate

planning and handling of projects such as group student physicals.[2] Too many responsibilities seemed to cause Javier to become "overwhelmed." The written evaluation admonished Javier to show improvement "to maintain her position" in administrative work habits, professional relationship with staff, planning, directing, and coordinating and organizing work for others.

A conflict in the testimony of Javier and McHoney emerges regarding the former's behavior upon receipt of the evaluation. McHoney and a corroborate witness, both testified that Javier used profanity. Sometime later a memo was given to Javier which included reference to her use of profanity, and then later a different memo was given to her, changed to delete reference to profanity. In the final analysis, Javier became very loud and defensive about the evaluation. Javier concedes that she was "in a state of shock," and "appalled" at the evaluation.

Also, according to Javier, sometime after the first evaluation, Lappin and McHoney stated that the reason Javier could not see the "big picture" was because she came from a small country and university. Javier is from Guam and graduated from the University of Guam.

About a week before November 28, 1990, McHoney conferred with Lappin about Javier's performance. McHoney recommended that Javier be rejected as a probationary employee, because she was not performing or functioning as a Registered Nurse III. Lappin concurred.

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[2]Javier conceded that they were always short of staff.

Lappin testified that she had been aware of the first evaluation and observed, on her own, that there had not been improvement between the two evaluations.

On November 28, 1990, McHoney presented the second evaluation to Javier. Although somewhat similar in positive support for Javier's nursing (clinical skills and knowledge) and attitude, the narrative was again negative in assessing Javier's administrative performance. Javier was still overwhelmed and unable to focus on the big picture. She was still unable to maintain the scheduling, did not communicate with staff and was unable to prioritize chores.

McHoney wrote that counseling Javier had been difficult, and Javier's performance had remained unsatisfactory in administrative responsibilities. McHoney felt Javier was unacceptable to continue as Assistant to the Director.

Although unclear as to when the conversation took place, Javier testified that after her argument with McHoney over the evaluation, she went to union representatives. McHoney said something to the effect that it would be difficult for her to be Javier's supervisor, for fear that one day the representatives would knock on her door.

On November 29, Brian Young (Young), CSEA Division Director, requested a meeting with McHoney to discuss the November 28, 1990, performance evaluation pursuant to the collective bargaining agreement. It is unknown whether a meeting took place.

On December 18 the personnel department notified Javier that she was rejected from her assistant director position, effective December 21. The rejection was based upon Lappin's recommendations, written December 18. On that date Lappin wrote to the personnel office and separately, to Javier, that Javier's planning abilities for multiple tasks were inadequate, her ability to make independent judgment was clouded, and that she had not developed supervisory skills since the previous evaluation. All of these factors had been indicated in the September evaluation, wrote Lappin, and Javier had not significantly improved in those areas since that time to merit continued employment.

Lappin credibly testified that she did not know of Javier's union recruitment activities nor of her efforts to use rooms for meetings.[3]

Lappin and McHoney credibly testified that prior to the letter from CSEA, they did not know Javier had secured CSEA to represent her on the evaluation. McHoney did not learn of it until the afternoon of November 29, when she got a copy of the memo from Young requesting the meeting about the evaluation. Lappin did not learn of Javier's union representation until after the unfair practice charge had been filed with PERB.

[3]Use of the rooms were subject to availability, and coordinated by Lappin's secretary. Javier testified that she checked with Lappin's secretary to schedule use of the rooms.

ISSUE

Did CSU reject Javier during her probationary employment in retaliation for participation in protected activities and thereby violate subsection 3571(a)?

CONCLUSIONS OF LAW

Employees of CSU are guaranteed the right to form, join and participate in the activities of employee organizations of their own choosing for the purposes of representation on all matters of employer-employee relations. Under section 3571(a) it is an unfair practice for the employer to impose or threaten to impose reprisals or to discriminate against employees or otherwise interfere with or restrain or coerce employees for their exercise of those rights.

In order to prevail in a case of employer unlawful retaliation or discrimination, Charging Party must establish that she was engaged in protected activity, the activity was known to the employer, and that the employer took adverse action because of such activity. Novato Unified School District (1982) PERB Decision No. 210.[4] Unlawful motivation is crucial to charging party's case. In the absence of direct evidence, an inference of unlawful motivation may be drawn from the record as a whole, as supported by circumstantial evidence. Carlsbad Unified School District (1979) PERB Decision No. 89. From Novato and a number of cases following it, any of a host of circumstances may justify

[4]PERB utilizes the Novato test for HEERA cases. California State University, Sacramento (1982) PERB Decision No. 211-H.

an inference of unlawful motivation on the part of the employer. Among such circumstances, arguably, present here, are: the timing of the adverse action in relation to the exercise of the protected activity; North Sacramento School District (1982) PERB Decision No. 264; the employer's disparate treatment of the employee, State of California (Department of Transportation) (1984) PERB Decision No. 459-S; departure from established procedures or standards, Santa Clara Unified School District (1979) PERB Decision No. 104; or inconsistent or contradictory justification for its actions State of California (Department of Parks and Recreation) (1983) PERB Decision No. 328-S.

Once an inference is found, the burden of proof shifts to the employer to establish that it would have taken the action complained of, regardless of the employees' protected activities. Novato, supra. PERB Decision No. 210; Martori Brothers Distributors v. Agricultural Labor Relations Board (1981) 29 Cal.3d 721 [175 Cal.Rptr. 626]. Once employer misconduct is demonstrated, the employer's action,

> . . . should not be deemed an unfair labor practice unless the board determines that the employee would have been retained "but for" his union membership or his performance of other protected activities. (Ibid.)

The complaint alleges that Javier was a job steward for CSEA. The record evidence does not demonstrate or even suggest Javier held that position. Charging Party neither testified to that role nor offered any evidence that she occupied such a position. The record does establish that in March of 1990,

Javier recruited employees to join CSEA. She arranged for employees to meet in the employer's facility. These actions by Javier are not disputed to be the kinds of employee actions that are protected under the HEERA. McHoney was aware of Javier's activities.

To prevail, Charging Party must connect the employer's alleged series of retaliatory acts, the extension of the probationary period, the adverse performance evaluations and subsequent termination to her activities of recruiting members, securing a room or rooms for meetings of employees, her solicitation of McHoney's interest in a meeting about the Lee incident, and her having union representation on the evaluation of November 28.

Such connection pales upon examination and is found not to exist. Moreover, even if an inference were found to exist, the employer's action clearly would have occurred despite the employee's union activity.

The March activity of signing up members for CSEA, clearly protected activity, predates, by a substantial amount of time any adverse action by the employer. Javier was unspecific as to when she arranged meetings of nurses, but if it was the means to recruit nurses, then it too, was during or before March. No connection between the Personnel Office, which caused the error in the probationary period to emerge, and that office's steps in June of 1990 to correct the error was established by Charging

Party. It was not shown that the Personnel Office had any knowledge of her recruitment activities.

It is apparent that Charging Party's theory of retaliation is that Javier's invitation on or about September 11 to meet with another employee, in response to McHoney's distress, precipitated the adverse responses from the employer: the extension of the probationary period and the unfavorable evaluations and termination.

Although the probationary change took place, according to Javier, some three days after the alleged Cindy Lee event, the letter setting forth the revised end-of-probationary period was, in fact, dated June 25, 1990, well before the Lee event. The only event placing the probationary period issue in proximity to the Lee event was Javier's date of signature. She offered no explanation or testimony that the June 25 letter was given to her after the Lee event.

The letter was issued by the personnel office, not by McHoney. No evidence was offered by Charging Party that the personnel office had any knowledge of her protected activities. McHoney knew nothing of the probationary period error until she was notified by the personnel office that two employees had been erroneously given letters indicating one-year probationary periods. Significantly, it was established that the action was not an extension of Javier's probationary period but rather the correction of an erroneously issued letter indicating a one year probationary period. An employer can rebut evidence suggesting

an inference by explaining away evidence, before the burden of proof shifts to it. California State University (Sacramento), supra, PERB Decision No. 211-H.

Nor does a theory of disparate treatment find application here. The error of the probationary period did not affect Javier alone, but rather also affected another employee. No evidence was offered by Charging Party to suggest that the other person was engaged in activities protected by the HEERA. There was no treatment of Javier different from other employees in like circumstances.

This same explanation negates a contention of departure from standard procedures by the employer. It was established that the probationary period for all nurses, including the Registered Nurse III, was a two-year period. The employer took steps to rectify the error with respect to Javier and another nurse, to conform their probationary periods to that required by employer policy. Neither the application of the two-year rule to Javier, nor the step to rectify the initial but infirm letter indicating a one-year period were departures from the employer's procedures. It made the same application and step to rectify the error with respect to another employee.

Further, it is apparent that Charging Party contends that McHoney's disposition towards employees who engage in representation work was somehow different than those who simply joined the union. Obviously, if McHoney encouraged employees to join the union, as the record demonstrates, she would not respond

negatively when such employees did join. The record evidence is barren, absolutely, of any such distinguishing employer reaction to union representation as opposed to recruitment activity. Moreover, no representation issues emerged prior to the adverse performance evaluations were given.

The Lee incident did not present Javier as a representative of Lee. Javier was not involved in the Lee dispute and did not suggest to McHoney that she was representing Lee. Her only suggestion was whether McHoney wanted to meet with Lee about the "situation." As has been found, Javier did not seek representation for herself until after the second adverse performance evaluation had been issued. Representation by CSEA, having occurred after the adverse evaluation was issued, could not be the cause of that adverse evaluation.

The employer's explanation of its actions was not inconsistent or contradictory. Javier was appointed to the position to assume and fulfill administrative responsibilities. She was a good clinician, and had a good attitude about her nursing responsibilities. The employer rated her as such. These qualities do not translate to acceptable administrative performances, however. At all times the employer has consistently taken the position that Javier simply did not develop the administrative skills necessary for the position she held. There is no inconsistency between commending a nurse for good clinical skills and taking a different position with respect to administrative capabilities.

Finally, even if Javier's casual inquiry of September 11 was deemed to constitute representation-activity, timing alone does not justify an inference of unlawful motivation. Moreland Elementary School District (1982) PERB Decision No. 227. As just discussed, no other factors give rise to an inference that the employer took the action because of Javier's activities.

The termination notice was issued on December 18. This did follow the notice to McHoney that CSEA was representing Javier, and that it desired a meeting with the employer about the evaluations. Javier was terminated on December 21, just some 20 days after her union representative attempted to arrange a meeting with the supervisor about an evaluation. The evidence is clear, however, that the decision to reject Javier had been reached before the employer was put on notice about Javier's status as a represented employee. McHoney and Lappin agreed in November to terminate Javier, and their determination that she was unacceptable in the assistant to the director position was iterated in the November 28, 1990, evaluation. Hence, her representation status had no bearing on the decision to terminate her.

Even if the forgoing circumstances should suggest a inference of unlawful motivation because of Javier's activities and the employer's actions, the employer has demonstrated it **would** have taken the same action notwithstanding such activity. The evidence presented during the course of this hearing shows that the employer was concerned about Javier's supervisory or

administrative capabilities. By her own admission, Javier was subject to comments by the employer about her actions before the first adverse evaluation. She felt stifled and unfairly questioned about her conduct. The September evaluation given to Javier by McHoney indicated the need to improve in certain areas of administrative responsibility. Javier did not improve in those areas, and, indeed, took great umbrage at the criticism. Ten weeks after the first evaluation, the employer determined that Javier had not and could not rise to the level of performance it expected. The employer determined to reject her from her probationary status. This determination had no relationship to Javier's activities in connection with the employee organization. The employer would have rejected Javier regardless of those activities.

It is concluded therefore, that Charging Party has failed to raise an inference of unlawful motivation on the part of the employer in its decision to reject her during probation. Even if an inference of unlawful motivation is according to Charging Party, it is further found that the employer would have acted as it did regardless of such activity. Accordingly, the underlying unfair practice charge and the complaint should be dismissed.

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, unfair practice charge SF-CE-319-H, Stalinita Javier v. California State University,

San Francisco, and companion Public Employment Relations Board (PERB) complaint are hereby DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. In accordance with PERB Regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (See Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (See Cal. Code of Regs., tit. 8, sec. 32135; Code Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

Dated: September 4, 1991

GARY M. GALLERY
Chief Administrative Law Judge